United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

8/20

76-1198

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by:
PHYLIS SKLOOT BAMBERGER

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UNITED STATES OF AMERICA,

Appellee,

-against-

DAVID DURANT,

Appellant.

Docket No. 76-1198

BRIEF FOR APPELLANT
DAVID DURANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

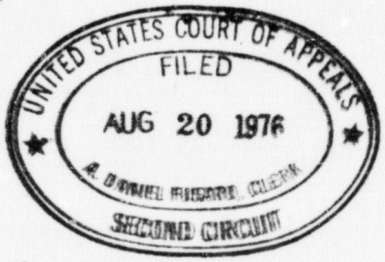

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
-against-	:	Docket No. 76-1198
DAVID DURANT,	:	
Appellant.	:	

BRIEF FOR APPELLANT
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the Court's failure to grant the defense request for a fingerprint expert is error requiring reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Mark A. Costantino) rendered on April 13, 1976, convicting appellant after a jury trial of bank robbery while aremd (18 U.S.C. §2113(d)) and sentencing him to a term of fifteen years in custody.

The Legal Aid Society - Federal Defender Services Unit was assigned as counsel on the appeal after assigned trial counsel was relieved.

Statement of Facts

Michael Reed, appellant and a third man were indicted for a bank robbery which took place on October 10, 1975.

In a pre-trial proceeding held on January 13, 1976 defense counsel advised the Court that fingerprints would be used in the Government's case and requested that appointment of a defense expert to examine the prints. In opposing the motion, the Assistant United States Attorney stated:

> We have an expert, he's employed by the FBI. I think it is ludicrous that the Government should pay for a second expert . . . He could cross-examine our expert.
>
> (Id. at 5)

The Judge denied the request telling defense counsel to cross-examine the Government witness to ascertain discrepancies (Id. at 5).

On February 2, 1976, a jury was empaneled to try appellant and the trial was continued to the next day.* At the trial it was shown that on October 10, 1975, a branch of the Chase Manhattan Bank, insured by the Federal Deposit Insurance Company (62)**, was robbed (23, 46) by three men (28) and $3,256 was taken in the robbery (63). One of the men remained near the entrance of the bank and carried a rifle (27), and one went to the officer's section carrying a shotgun (26).

The third was carrying a pistol (51). He climbed over the divider in front of the tellers' cages (48). The divider was partially of wood and the top section was of glass (32) going to a height of five feet, nine inches (57, 67). After

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*Michael Reed had pleaded guilty on November 14, 1975, to bank robbery. At the time of the plea, the Assistant United States Attorney stated:

> The agreement is subject to the terms I'd like to put on the record now which is that the Government will move to dismiss Count Two at the time of sentencing.
>
> In addition, the Government has reached the following agreement with Mr. Reid: Mr. Reid has agreed to cooperate fully with the Government and testify before the Grand Jury and at trial, if required, against his co-defendants.
>
> In the event that Mr. Reid makes any materially false statement in the course of his cooperation, he will be subject to prosecution for perjury. . .
>
> If Mr. Reid fully cooperates, the Government will advise the Court as to the extent of his cooperation prior to sentencing.

**Numerals in parentheses refer to pages of the trial

climbing over the divider, the man asked two of the tellers to put the money in a plastic bag he held (51, 53). Then the man asked someone to buzz open the door from the tellers section and he and his associates backed out of the bank (53).

Since the three men had their faces covered (54, 99), a general description of the body builds of the three robbers was all that those in the bank were able to provide to Government officials (54).*

Accomplice Testimony

Pursuant to his agreement, Reed testified against appellant. He testified that he met appellant at appellant's house in Queens, that the two of them drove to Brooklyn to pick up a person named Henry (85), returned to Queens (57), parked the car about a block and one half from a bank (87), went to the home of an acquaintance of Reed's (88) named Ronald Freeman, told Freeman that if he remained in his apartment he could make some money (89), and then left for the bank (91). Appellant was said to be the participant in the robbery who went over the counter into the teller's area (93). Reed testified that he, appellant and the third man (86) each had a gun (91), and that the guns were loaded (92).

After the robbery, the three of them went back to Freeman's house and divided the money (103).

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*No photographs were taken.

Reed revealed that he had pleaded guilty to one count of the indictment and that he knew his plea could subject him to a twenty year term of custody (81). Reed acknowledged that he was told that the Government would bring his cooperation to the attention of the Judge who was to impose sentence (107). He hoped to get a reduced sentence as a result of his cooperation (149). Reed felt that if he failed to testify against appellant, the Government would cancel the deal and prosecute him (148).

Significantly, Reed acknowledged that he lied when it inured to his benefit to do so (150), and that, as an example, he did not reveal on a job application that he had been undesirably discharged from the armed forces because he knew the information would prevent his getting employment (135-6).* He also admitted that he initially denied committing the robbery because he did not know the extent of the Government's evidence and he believed it was to his advantage to deny participation (138).

Reed admitted, after an initial denial (107), that he had a previous criminal conviction for assault for which he was fined $100 (108). He paid only $10 of the fine (121-2) and a bench warrant was issued for his arrest (122). He also acknowledged that he hit his wife (126). Durant, who was the brother of Reed's wife, told Reed not to hit her (126-7).

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*Reed's undesirable discharge was caused by his going AWOL (108).

According to Ronald Freeman, Reed, appellant and the third man came to his apartment, Reed told him they were going to commit a robbery, and Reed and appellant had weapons (219-220). Freeman contradicted Reed's testimony, however, saying that he told Reed he was not going to be home later that day (219-220).

The three returned to Freeman's apartment ten to fifteen minutes later and began counting the money (222). Appellant changed his clothes (223). The three unloaded the guns and then left.

Freeman agreed to cooperate with the Government when he was told by the FBI that he would be charged as an accomplice and could face up to twenty years in prison (261-2). Freeman was not charged with any crime.

Freeman acknowledged having a prior conviction for mail theft, and having violated the term of probation imposed pursuant to that conviction (232). He claimed the violation was a failure to report to his probation officer at the end of the probation period (233). On cross-examination, however, Freeman revealed that he had changed residences on two occasions without the permission of his probation officer (238, 240).* He also acknowledged being told that the Government would bring his cooperation to the attention of the Judge who would dispose of the probation violation (232).

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*It is significant to note that the prosecutor made no effort to clarify Freeman's attempt to minimize his probation violation.

Fingerprint Evidence

At 6:00 p.m. on October 10, 1975, FBI Agent Russell lifted a partial latent fingerprint (175) from the outside top of the window of teller one's position (179) about three inches down - i.e., at a height of five feet, six inches (187).* The print was found in a position horizontal with the floor (180, 182). A Government fingerprint expert, FBI Agent Saunders, testified that a comparison of the partial latent thumb print (Government Exhibit 8) with the known thumb print of appellant (Government Exhibit 9) revealed that the two were prints of the same person.** The expert testified there were fourteen points of identity between the two (198). He felt that seven points of identity were enough to make a positive identification (199).

Unable to produce his own fingerprint expert, defense counsel attempted to challenge the testimony of the Government's expert. The expert admitted seeing up to fifty-five points of identification and probably up to one hundred (203-4) but insisted that neither he nor the FBI had a rule

---

*There was testimony that a private firm cleaned the bank every day (64) but there was no way of knowing whether the window was washed (66).

**Only the prints of appellant and Reed were given to Saunders for comparison (208).

requiring a set number of points (205). Saunders acknowledged that many years of training were required to make the comparisons (207-8), but that it was not possible for him to make a mistake (209). Saunders further testified that he did not know how long the print was on the window (212). However, on redirect, the Assistant United States Attorney elicited from Saunders that the print was fresh within a week - because it had a dark outline (213-4). Saunders testified that no prints found on the gun were identifiable; those on the rifle were Reed's (214-15).

Enlarged copies of the comparative fingerprints were prepared for the jurors, but only nine points were marked (Defendant's Exhibit C for identification) (207).

Summation

During the course of the prosecutor's first summation, taking eighteen pages of transcript (278-295), the prosecutor argued the significance of the fingerprint evidence on at least eight separate instances (280, 28 283, 284, 286, 291, 293, 293-4).

On his summation, defense counsel argued that Saunders was psychologically predisposed to his findings with respect to the prints because he was an FBI agent, and because appellant's and Reed's prints were the only ones sent to him (315). He tried to explain to the jury that Saunder's

claim that he never made a mistake should not be treated literally (317).

In the rebuttal summation, the Assistant United States Attorney argued that the significance of the fingerprint evidence (330, 331-3) and told the jurors:

> And I suggest to you that a fingerprint, evidence, is more powerful than any identification testimony. What can you say about a fingerprint?
> (330)
>
> * * *
>
> The defense would have you believe that this testimony concerning the fingerprint is not conclusive when a man of eighteen and ahalf years of experience, who's been doing this for half his life, this is his job, he sits there and he analyzes fingerprints, he told you millions of fingerprints, and you think this man is going to put his reputation as a professional on the line, traveling from Washington to New York, he's going to get on the stand and he's going to identify a fingerprint as positive? He doesn't say maybe. He doesn't even say seventy-five per cent. He says this is a positive identification. This fingerprint is the same as the fingerprint on Durant's card. The same. And he says, "All I need is seven points." You have have a hundred points, you can have fifty points, you can have twelve points. WE have fourteen in this case. And I made a nice little diagram, if you want to use it, and he put nine points on.
>
> Now, if there were twenty-seven points, you'd have a tough time putting the numbers in. These are the ones that might have been visible on the diagram. But he says fourteen points and he says a positive identification.
>
> I suggest to you that there's no more powerful evidence in the law than fingerprint.
> (331-32)

Also in his summation, the prosecutor on four occasions told the jurors that Reed would receive a twenty year sentence (283, 287, 289, 290).

> Well, first of all, the first contention of the defense is that Reed is a liar, he's lying. He made this whole thing up. Of course, he didn't make it up. That he robbed the bank, because we know Reed robbed the bank. Why would he be admitting to bank robbery, getting a twenty-year maximum sentence that he pled guilty to unless he was involved in the bank robbery?
>
> (283-4)

* * *

> Obviously, Reed is the kind of person who you could attack his character. This is the brother-in-law of the defendant Durant. Now, what's his motive. The fact that he was able to plead to a twenty-year maximum bank robbery count in an indictment? This is supposed to make him lie against his own brother-in-law? Is that the defense's argument? What motivation did he have? Are they suggesting that Reed could conceivable get more than twenty years? In a bank robbery like this, nobody was killed, that he was going to get forty-five or fifty years? That, too, is absurd.
>
> (287)

* * *

> The defense is saying Durant is not one of those three bank robbers. Well, if Durant is not, who is? Are they suggesting to us that Reed is protecting the other two bank robbers while he takes a twenty-year sentence?
>
> And then implicates his own brother-in-law? It doesn't make sense.

> Why would he implicate his own brother-in-law unless his own brother-in-law was involved in the bank robbery? Why would he be protecting two other people who are now free in some city, while he is going to go to jail for up to twenty years? (289-90)

The Jury Deliberations*

After the jurors began deliberations they requested that the testimony be read concerning the fingerprints on the weapons** (369-70, 372), and they requested the actual fingerprints used in evidence including the blow-up (372).

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*The instruction given on appraisal of expert witnesses was:

> You have heard testimony in this case regarding certain fingerprints. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists in those whom we call expert witnesses. A witness who by education and experience has become expert in some art, science or profession or calling, may state an opinion as to relevant and material matter in which they profess to be expert, and may also state their reasons for the opinion.
>
> You should consider each expert opinion in this case -- we had two -- received in evidence in this case, and give it such weight as you may think it deserves.
>
> If you should decide that the opinion of the expert is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.
>
> (356-57)

The complete charge is annexed as C to Appellant's Appendix.

**The redirect testimony of FBI Agent Saunders was read (37). The testimony was that the fingerprints on the rifle were Reeds and no prints came from the pistol (214-14)

The jury returned a verdict of guilty on the charge of bank robbery while armed.

Sentence

On February 20, 1976, Reed received a sentence of five years imprisonment, six months in custody and four-and-one-half years on probation. (Docket sheet of Reed in 75 Cr. 776).

On April 13, 1976, appellant was sentenced to a term of fifteen years in prison.

ARGUMENT

POINT I

THE COURT'S FAILURE TO GRANT THE DEFENSE REQUEST FOR A FINGERPRINT EXPERT IS ERROR REQUIRING REVERSAL.

Prior to trial assigned defense counsel requested that he be permitted to have, at Government expense, an expert to examine the fingerprints. The prosecutor vigorously opposed the application asserting it was ludicrous for the Government to pay for two experts; that the Government had its expert from the FBI and that defense counsel could cross-examine the Government's expert. The district judge accepted the Government position and denied the request. This ruling by the district judge was error requiring reversal. United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975); Brinkley v. United States, 498 F.2d 505 (8th Cir. 1973); United States v. Bass, 477 F.2d 723 (9th Cir. 1973); United States v. Theriault, 440 F.2d 713 (5th Cir. 1971), cert. denied, 411 U.S. 984) (1972); United States v. Schultz, 431 F.2d 907 (8th Cir. 1970); United States v. Tate, 419 F.2d 131 (6th Cir. 1969).

Under the Criminal Justice Act, 18 U.S.C. §3006A(e)(i), an indigent defendant is entitled at Government expense to expert services "necessary for an adequate defense." In arriving at the standard of what is necessary, the Courts

have considered that the purpose of the provision is to furnish services to those unable to obtain them thereby placing indigent criminal defendants in a nearly equal position with those who can pay. United States v. Hartfield, supra, 513 F.2d at 258; United States v. Bass, supra; United States v. Theriault, supra, 440 F.2d at 716 (Wisdom, J., concurring); United States v. Tate, supra, 419 F.2d at 132. See also, United States v. Henderson, 525 F.2d 247, 251 (5th Cir. 1975); United States v. Schappel, 445 F.2d 716, 721 n.13 (D.C.Cir. 1971). It is also clear that the statute was to enable the indigent to meet the resources of the Government "pitted against him" so as to guarantee a fair trial. Letter of Transmittal from President Kennedy of March 8, 1963, 1964 U.S. Code Cong. and Admin. News 2993; United States v. Hartfield, supra, 513 F.2d at 258.

Given these purposes, several Courts have adopted the standard of need articulated by Judge Wisdom in Theriault: an expert will be provided on defense counsel's reasonable request in circumstances in which counsel would engage such services if his client had the financial means to support his defenses. Brinkley v. United States, supra, 498 F.2d at 510; United States v. Hartfield, supra, 513 F.2d at 257; United States v. Bass, supra, 477 F.2d at 725.

The majority opinion in Theriault formulates the inquiry, not very differently, as whether the expert is reasonably necessary for an adequate defense. See United States

v. Hartfield, supra. In Schultz, the Court suggests the test to be whether further exploration of the facts may prove beneficial. 431 F.2d at 911.

Since the expert's services are provided for pre-trial preparation and trial advice as well as testimonial evidence (United States v. Chavis, 486 F.2d 1290, 1292 (D.C. Cir. 1973); United States v. Bass, supra, 477 F.2d at 726; United States v. Theriault, supra, 440 F.2d at 715; United States v. Taylor, 437 F.2d 371, 377 n.9 (4th Cir. 1971)), need is established when on the facts of a case a defense requiring technical expertise is presented or reasonably considered for presentation to the jurors (United States v. Taylor, supra; United States v. Tate, supra; United States v. Hartfield, supra; United States v. Bass, supra; United States v. Schultz, supra*). Indeed, here, both the Judge and the prosecutor agreed that it was appropriate for the counsel to try to show that there were "discrepancies" in the latent fingerprint found at the

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*In United States v. Chavis, 476 F.2d 1137 (D.C.Cir. 1973), the Court stated need would not be established if there was "absolutely no reason to think that such a plea [insanity] would be successful." Id. at 1143. The interjection of the concept of success has not been accepted (See e.g., United States v. Schultz, supra, 431 F.2d at 912), or has been explicitly rejected (Brinkley v. United States, supra, 498 F.2d at 510). It is inconsistent with the undisputed purpose of the statute to provide pre-trial preparation assistance and with the obligations of counsel to explore all reasonable defenses. Indeed, the D. C. Circuit may not even adhere to the test any longer, for in the subsequent opinion in Chavis, (486 F.2d 1290) no mention is made of success.

bank. The Court and prosecutor, however, determined, over defense counsel's judgment, that he should do it by cross-examination, without technical assistance in the preparation of his case and without the ability to call his own expert as a witness. However, the challenge to the fingerprints was critical to the defense. Under these circumstances, the Judge, once apprised of the technical nature of the Government's evidence, should have relied upon defense counsel's request and his appraisal that he needed expert help to analyze the evidence. United States v. Hartfield, supra, 513 F.2d at 257.

Nonetheless, despite the request, the Court accepted the Assistant United States Attorney's position that one expert, even though a partisan, was enough and that the Government should not be compelled to pay for two experts. This reason for denying the request was not only totally irrelevant to the issue of "need," but it constituted a perversion of the statute. The experts appointed under the Criminal Justice Act are to provide services for the defense. They are not to submit their reports to the Court or prosecutor, nor are they to be neutral. United States v. Bass, supra, 477 F.2d at 725-6; United States v. Theriault, supra, 440 F.2d at 715; United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974). Here, of course, appellant did not even have a neutral witness, but was compelled to make his case through an FBI agent testifying for the Government.

The primary effort of the defense counsel on cross-examination was to show that the expert, Saunders, as a Government witness and employee, had been predisposed in making his analysis and had perhaps made a mistake in his identification of the latent print as that of appellant. However, because counsel was denied the aid or testimony of a defense expert and could not challenge or even ascertain how to challenge the procedures, technique, or analysis of Saunders, all that counsel succeeded in doing was eliciting from Saunders that he never makes mistakes.

Counsel might have been able to make several challenges if he had his own expert. Since the latent print was blurred (See Exhibit 8), an expert could have ascertained whether it was possible to make an identification at all.* Other latent prints had been taken from the bank and the gun, but no identification was possible. Even if the print had discernible features, the correctness of the identification may have been faulty:

> While ordinarily two equally competent fingerprint experts will not come to opposite conclusions on identity, in some cases of marginal ridge detail a difference of opinion can arise on whether the evidence is conclusive.

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*The 3500 material makes clear that the fingerprints were not used to identify appellant as a participant in the robbery prior to his arrest.

From the defense point of view, there are a number of circumstances which may interfere with the correctness of an identification, if they are not properly explained or accounted for:

> (1) A ridge count between two characteristics may be erroneous if dirt or dust has caused a ridge to appear as one or two islands;
>
> (2) Variation in pressure may cause discrepancies between prints such as a bifurcation being registered in another print as an ending ridge;
>
> (3) Excess pressure in an inked print may squeeze several ridges together so that they appear as one ridge;
>
> (4) Flexion creases, mottling, or even furrows might be erroneously interpreted as ridges;
>
> (5) Powder used to develop prints may stick between ridges, indicating the presence of a ridge characteristic where there is none;
>
> (6) Scars may interfere with comparison of pre-scarred record impressions.
>
> (Moenssens, Moses and Inbau, Scientific Evidence in Criminal Cases, 345-6 (Foundation Press 1973))

Counsel also examined on the required number of identical characteristics and elicited from the witness that the FBI practice required no particular quantity, although he thought seven was adequate. However, another expert may

well have disputed that practice, or taken the position that because of the condition of the particular print reliability would be enhanced by a specific number. Here, Saunders said he found fourteen, but for some unknown reason, he only marked nine on the blown-up photographs given to the jury. Defense should have been able to examine the accuracy of Saunders' claim of fourteen points since ten identical characteristics is "playing it safe" and below that point, experts could disagree. Moenssens, Fingerprint Techniques at 262-3 (Chilton 1971).

Counsel also tried to establish that the age of the latent print could not be determined with accuracy. See Moenssens, Fingerprint Techniques, at 130. While Saunders admitted that was true, he maintained that the print was recent because the image of it was dark. Counsel, without his expert, was unable to ascertain whether the technique used in removing the print affected the darkness of the image.

Since the print was found on the outside of the tellers window, in an area of general access at a height and position so that it could have been made by many people, counsel's challenge was a good one.

The importance of the fingerprint to the Government's case was unequivocal. The prosecutor repeatedly told the jurors that it was positive identification and that it supported the credibility of his accomplice witnesses. In rebuttal summation, the prosecutor strongly urged that Saunders

was an extraordinary expert and had no reason to lie. This argument was disingenuous since the prosecutor was the one who urged that defense counsel's attack on the fingerprints had to be by cross-examination of the expert. This kind of duplicitous prosecutorial attitude has been specifically condemned. See United States v. Chavis, supra, 486 F.2d 1292.

Of course, the prosecutor was properly concerned about the credibility of his accomplice witnesses. Michael Reed revealed a prior criminal record, a discharge from the military, and a history of misstatements when it inured to his benefit. Reed also testified that the prosecutor would reveal the cooperation to the sentencing judge, and that he hoped for leniency. He also believed that if he failed to testify for the Government, he would be prosecuted.*

Ronald Freeman too was seriously impeached. He had a prior record and a probation violation. Freeman substantially misrepresented the seriousness of his parole violation until questioned on cross-examination. Further, he revealed that the prosecutor would advise the Judge at the parole violation proceeding of his cooperation and he was not being charged with any responsibility in this case.

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*In an effort to restore the credibility of Reed, the prosecutor in his short summation, said four times (See supra at 10-11) that Reed was going to get twenty years and therefore had no motive to lie. This assertion was improper and incorrect. The prosecutor had no way of knowing what sentence the Judge would impose and in normal expectations, had no possible reason to believe that sentence would result. Indeed the disparity between Reed's sentence of six months in prison with four and one half years probation and appellant's sentence of fifteen years in prison is extraordinary.

The record also shows the fingerprint evidence played an important role in the jury's decision. During the deliberations the prints were requested and presumably examined by the jury, and the jury asked for a reading of testimony relating to the fingerprints.

Since the fingerprints played a key role at the trial and counsel's strategy and case were prepared without any of the necessary expert assistance, the trial was not in accord with the principles of fairness. Accordingly, the conviction must be reversed.

CONCLUSION

FOR THE ABOVE-STATED REASONS,
THE JUDGMENT MUST BE REVERSED
AND A NEW TRIAL GRANTED.

Respectfully submitted,

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August 20, 1976

CERTIFICATE OF SERVICE

Aug. 20, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Phyllis Sillcox Bamberger